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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1222

CHARLES L. WOLFF, JR., Warden
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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On behalf of David L. Rice, who prepared documents pro se.

The purpose of this appendix is to show the Court that, not only was David Rice victimized by illegal search and seizure, but that the evidence used against him was insufficient to support a finding of guilt. Further, this appendix intends to show that evidence was contrived and manufactured by the office of the County(Douglas) Attorney, that certain testimony was either false or unsupported by actual evidence, and that certain Court and police officials did willfully obstruct justice in order that the State of Nebraska might obtain a conviction of David Rice.

It is realized that the main issues that appear to concern the Court in this instant case are those of the exclusionary rule and the access of State prisoners to the federal courts. However, it is of the utmost of importance that the Court be made aware of the fact that this case does not involve a matter, as the State contends, of a guilty party "beating the conviction on a technicality," but involves an innocent party being falsely accused and convicted of a crime in retaliation for his espousal of unpopular political beliefs(which included consistent verbal and written criticism of the Omaha Police Dept. and police depts. in general), which retaliation, in this instant case, amounts to a basic and fundamental right, freedom of speech, being violated by the State of Nebraska and agents thereof.

A

Exhibit 44 refers to a small length of wire introduced in evidence against Rice. It was testified by State Witness Wilder, a tool & die "expert," that this length of wire had been cut by a pair of needle-nosed pliers found in the Rice home. This pair of pliers were introduced in evidence as exhibit 35. However, the conclusion of the witness that the length of wire had been cut by the afore-mentioned pliers was unsupported. In fact, testimony by that witness, and others as well, made it clear that there was no connection between Exhibit 44 and the bombing whatsoever.

Testimony by Jerry Volcek of the Omaha Police Dept. showed that Exhibit 44 had been found, not at the scene of the bombing, but at the house next door, that it had been found on the basement floor in close proximity to a tool bench(See Vol. 7 of the trial transcript, pp. 743-745, line 16 of p. 743 through line 24 of page 745.).

The testimony of Witness Kenneth Snow indicates the following:

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that the piece of wire(Exhibit 44) found next to the scene of the bombing contained no remarkable characteristics that would distinguish it from any other type of copper wire(See pp. 830-831, lines 24-1.);

that there was no indication of the presence of dynamite on that piece of wire(See p. 830, lines 7-10.).

An examination of Witness Roland Wilder makes clear that:

his conclusion that Exhibit 35 had been used to cut Exhibit 44(See p. 859, lines 12-15) was little more than a very convenient opinion for the use of the State of Nebraska in its prosecution of respondent, as further testimony by the witness points out that Exhibit 44 may have been cut by pliers other than those of respondent(See p. 866, lines 19-25; p. 867, lines 1-7; pp. 867-868, lines 21-4).

At this point, respondent refers the Court to the testimony of Duane Peak and to a demonstration he gave, during that testimony, as to the manner in which the suitcase bomb was constructed. Along with the other evidence brought to the Court's attention by respondent, this testimony shows that the State willfully introduced Exhibit 44 into evidence with the full knowledge that it had no connection at all to the crime with which respondent was charged. Duane Peak testified that the copper wire used in the construction of the bomb was the lead wire attached to blasting caps(See p. 489, lines 10-12.). There was nothing in either his testimony or demonstration to indicate that any other copper wire was used in the construction of the bomb other than the blasting cap lead-wire of which type was entered into evidence as having been seized from the Rice home and designated "Exhibit

Respondent brings to the Court's attention that the wire introduced as Exhibit 20 was approximately(from eye view) one-half the diameter of the length of wire introduced as Exhibit 44; that the former appeared to be old and corroded; and that respondent and trial counsel cut from exhibit 20 a segment of wire of about the same length as that referred to as "Exhibit 44," placed the two segments in separate plastic vials, and presented these items to the jury for examination and comparison.

Respondent contends that the entering into evidence of the segment of wire found next door to the scene of the bombing, in close proximity to a work bench(where a piece of wire might naturally be found), was without justification; that the fac t that no traces of dynamite were found on the wire further supports this contention, in that the likelihood of a piece of wire used in the construction of a bomb(of such explosive force as the one which killed Patrolman Minard) not showing any evidence of such an explosion is indeed slim; that the manner in which the comparison tests by Wilder were performed are suspicious; and that the test results, showing fifteen similarities and twenty-five dissimilarities weakens further the credibility of Wilder's conclusion that the segment of wire had been cut by the needle-nosed found in Rice's home. Further, the fact that the trial judge, Donald Hamilton, permitted Exhibits 35 and 44 and the testimony in their regard to go to the jury as evidence indicates an abuse of judicial discretion and a willingness on his part to cooperate with the State's obstruction of justice in the Rice case.

B

Exhibit 33 was entered into evidence against respondent in the trial. This was a pair of pants taken from the Douglas County Jail by a Richard Curd and testified to as having been the property of David Rice. Under direct examination, Kenneth Snow stated that laboratory tests to which these pants were subjected showed the presence of certain particles, which he concluded to be particles of ammonia dynamite(See p. 795, lines 15-23.). However, under cross-examination, Snow was asked whether the particles found in Exhibit 33 could have come from some source other than dynamite. The answer he gave was to the effect that they could have(See p. 838, lines 11-22.).

Respondent takes it for granted that the Court is aware of the fact that many of the elements contained in such a common type of explosive as ammonia dynamite can also be found in such ordinary items as: matches, phosphorus detergents, gun powder, etc. Respondent contends that the testimony of Kenneth Snow shows but two things conclusively, that particles were indeed found in the right front pockets of the pants belonging to David Rice and that these particles did contain elements that can also be found in ammonia dynamite. Respondent further contends that an examination of the pants pockets of the County attorney might also have turned up particles containing elements also found in ammonia dynamite.

David Rice has maintained that he did not keep explosives in his residence (p. 1094, lines 19-23; p. 1096, lines 21-25). He contends now, as he has in the past, that the dynamite and blasting caps, in order for those items to have been found in his house, would have to have been planted there. Respondent submits to the Court the following items of evidence to lend credence to that contention.

On the evening of the police raid on Rice's home, Michael Rice(brother of respondent) and Ethan Woods were arrested outside the residence, taken to police headquarters, and questioned separately. These two parties gave statements to the police to the effect that they had gone by David Rice's house, observed a door open and lights on, that they hollared for respondent and had gotten no response, and waited out in the yard for someone to come out. They stated that they knew the residence had been burglarized some weeks before. Woods and Michael Rice were then arrested while standing in the yard(p. 734, line 13-p. 736, line 23).

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The statements of Michael Rice and Ethan Woods, as referred to in the above paragraph are belabored by the testimony of Sgt. Swanson who testified that, after he and other officers arrived at the Rice home, he and Sgt. Pfeffer left the house to go obtain a search warrant, that the other officers remained at the house to secure it(p. 100, lines 8-15).

In support of the contention that the dynamite and blasting caps allegedly "found" in the Rice home were either planted there or were not there at all, respondent submits certain conflict in the testimony of police in regards the specific locations in the Rice home where these items were "found."

a. Sgt. Swanson testified that the box of dynamite "found" in the basement of Rice's house was not covered but was in plain view, once he had looked in the coal bin(p. 712, lines 12-16). However, Sgt. Pfeffer testified that he had prepared a supplementary report on the raid of the Rice home. In that report, it was stated that the box of dynamite was hidden under ~~the~~ a door(p. 734, lines 3-6). Further, the testimony of ~~Swanson~~ Pfeffer placed the blasting caps "found" in the Rice house inside a roll of linoleum resting next to a radio (p. 730, lines 7-8). However, in his supplementary report, it is stated that the blasting caps were found behind the radio(p. 734, lines 6-8).

b. On June 11, 1970, Federal District Court Judge Warren K. Urbom held an evidenciary hearing on respondent's petition for Writ of Habeas Corpus. During the course of that hearing, several police witnesses gave testimony as to where in the basement of 2816 Parker the box of dynamite had been "found." These witnesses were shown a photograph of the interior of the Rice basement and were asked to point out in this photo, designating the exact spot where the dynamite had allegedly been discovered. The various witnesses showed a degree of confusion in making this designation. Testimony at respondent's preliminary hearing, trial, and at the evidentiary hearing at issue placed the discovery of the box of dynamite in a coal bin in the Rice basement. The difficulty the police witnesses had in pointing out in the photo where they had "found" the dynamite was founded in the fact that the coal bin, by whatever cause, was not pictured in this photo. So that in pointing to various points on this photo and designating the location of the alleged dynamite find, these witnesses were, in fact, committing perjury.

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Respondent claims and has claimed that he did not have explosives in his house. But considering the fact that police witnesses claim that they did find dynamite and blasting caps in the Rice home, the question is naturally asked, "How did such items get there?" Respondent does not pretend to know the answer to that question, but can only suggest, can only conjecture that these items were placed in his home by some party or parties other than himself.

Of course, it is not the practice of the Court to base its decisions on conjecture or mere suggestion. However, respondent submits to the Court that his contention that the dynamite and blasting caps were either not actually seized from his home or that they were planted there is supported by the afore-mentioned circumstances, circumstances that are not conclusive, but, nonetheless, throw a light of suspicion upon the police claim. Respondent is not asking the Court to base whatever decision it makes on the basis of the degree of verity of opposing claims in this matter. Rather, his purpose is to show the Court that the alleged seizure of dynamite and blasting caps was simply one of many illegal and Constitutionally impermissable procedures utilized by the State of Nebraska in order to obtain a conviction of respondent.

D

Though respondent maintains that the testimony of the State's "star witness," Duane Peak, was not credible, he nonetheless takes this opportunity to refer the Court to one element of Peak's testimony, that having to do with his implication of certain persons as having had involvement in the killing of Patrolman Minard. The Court is so referred not without intention and purpose. Respondent intends, by this presentation, to give even further evidence of foul-play on the part of the State of Nebraska in its prosecution of David Rice.

As is readily apparent to the Court, Duane Peak pointed the finger of guilt to David Rice and Ed Poindexter. But the pointing did not end with these two men, but proceeded further to the persons of Frank Peak(p. 419-421, from line 5 of p. 419 to line 8 of p. 421), Raleigh House(p. 421, line 9 to p. 423, line 11), and Donald Peak(p. 468, lines 24-25; p. 469, lines 1-6 and 13-19; p. 470, lines 1-4; p. 481, lines 13-19; p. 540, lines 16-25; p. 541, lines 3-11; p. 558, lines 14-15). And, of course, Duane Peak, by admission, pointed the finger of guilt to himself.

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Of the six people Duane Peak implicated(himself included), the record indicates that only two, David Rice and Edward Poindexter, were prosecuted for the slaying of Minard. Duane Peak pled guilty to "juvenile delinquency." Considering the manner in which respondent was tried and convicted, it is conceivable that the State of Nebraska could have obtained convictions had it prosecuted any of the other persons implicated by Duane Peak. And, in the case of Donald Peak, the State might have had a case of considerable strength since several witnesses testified as to having observed Duane and Donald Peak together with the suitcase in question, as to having overheard these two discussing and/or laughing about the bombing(depositions of: Raymond Britt/p. 10, lines 6-11; Willie Haynie/p. 17, lines 2-25 and p. 23, lines 1-18; Annie Lee Morris/p. 8, line 23-p.11, line 13 and p. 32, lines 3-23).

It is the contention of respondent that the Douglas County Attorney's Office of the State of Nebraska were well aware, by statements of various material witnesses, of whom the guilty parties were, but was not impressed with the "political credentials" of the only two parties against whom disinterested parties might testify. Instead, the County Attorney seized upon the opportunity(presented by Duane Peak's association with N.C.C.F.) to go after the "kingpins" of the N.C.C.F. organization. The respondent, being the second

officer in that organization, fell very neatly into that category. Respondent further contends that the selective prosecution which characterized this case was no accident, that it was part of an overall design on the part of the State of Nebraska, not to see to it that the guilty were brought to justice, but to see to it that certain political agitators (respondent included) were convicted.

Respondent is not suggesting to the Court that the State of Nebraska should or should not have prosecuted certain individuals; nor does he suggest who may or may not have been involved in the Minard killing. Rather, respondent merely points out to the Court that the testimony of material witnesses is not consistent with the actions taken by the State of Nebraska in pursuing its conviction of David Rice.

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Respondent submits to the Court that the most damaging testimony against him, that of Duane Peak, was perjured testimony, that it was the testimony of a frightened youth, fearful for his life, and pressured into implicating Rice both by threats of the electric chair and an offer by the State which would enable him to escape that chair. Respondent submits further that the alleged facts and circumstances stated in Peak's trial testimony had been bent and forged into the form of a script so as to point to the guilt of respondent, that this "blacksmith work" was encouraged and assisted by the County Attorney's Office, particularly Arthur O'Leary. Respondent submits to the Court the following, for the Court's own evaluation, in support of the above claims.

1. Perjured testimony by Duane Peak

   a. On August 28, Duane Peak gave a statement to Sgt. Foxall in which he admitted his own guilt and did not implicate Respondent Rice(p. 565, line 14-p.575, line 13). Following the conclusion of that statement, Peak appeared before Judge Anderson(p. 575, lines 14-17).

   b. On August 31, Duane Peak gave a statement to Arthur O'Leary(Deputy Chief Prosecutor). That was the first statement given by Peak implicating respondent. In that statement, Peak claimed that he and Poindexter had gone to the Rice home and that Poindexter retrieved a suitcase and a case of dynamite from the basement of the Rice residence(p. 581, lines 11-20).

c. On September5, Duane Peak gave a statement to officers Birchard, Dailey, and Pheffer in which he maintained, ~~as in the August 31 statement~~, contrary to his statement of August 31, that he had carried the suitcase into the Rice home(p. 590, lines 15-19).

d. At the preliminary hearing of respondent on September 28, Duane Peak was asked a series of questions which had to do with the alleged involvement of respondent and another party in the bomb-slaying of Minard. Peak's responses absolved respondent of involvement(See preliminary hearing transcript, p. 4, lines 4-22).

e. At that same preliminary hearing, following a recess, Duane Peak was again called to the witness stand. And, during this second testimony, Duane Peak, noticably frightened and nervous(pre. hearing transcript, p. 77, line 25-p. 78, lines 1-4), Peak implicated respondent.

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f. David Herzog, Counsel for respondent, took a deposition of Duane Peak on February 4, 1971. In that deposition, Peak maintains that respondent was involved but claims that "David opened the door and took it(the suitcase)in."--(dep., p. 72, lines 2-5)

g. During the trial of respondent, Peak continues to point to guilt on the part of respondent. But in this testimony, he states, "I gave it(the suitcase) to Ed(p. 424, lines 1-2)."

It is not the contention of respondent that each and every statement of Duane Peak afore-cited is false. Rather, it is the contention that, if a person makes two or more statements that contradict each other, all of those statements cannot be the truth. Respondent has cited but a tiny few of the contradictory statements made by Duane Peak. There are many. But these few should be sufficient to make the Court aware of the fact that respondent's conviction was substantially the result of perjured testimony on the part of the chief and only alleged eye-witness against him. Respondent submits to the Court that, without the testimony of Duane Peak, the State could not have obtained a conviction of respondent. Should this Court accept the validity of this contention, then it must also accept that respondent was convicted by the use of perjury. It is submitted that the use of perjured testimony against a defendant denies that defendant the fundamental right of a fair trial.

2. Subornation of perjury by Arthur O'Leary

10h

- Direct Examination on Aug. 31, 1970 of Duane Peak by Special Prosecutor Art O'Leary at the Omaha Police Station.

Q. I want to go over it once again. As a practical matter, it doesn't make any difference what the truth is concerning you at all.

Mr. CAREY: Mr. O'Leary is correct on that. You want to tell him the truth.

Q. It doesn't hurt you one bit to tell me the rest, if there is any more.

A. That is all there was.

Q. What I am getting at is, when you left the bomb or the dynamite there, all there was was the wire trailing out of it and you set it upright, is that correct?

A. Yes.

Q. You didn't arm it or attach it to the floor or anything like that?

A. I didn't do anything to it.

Q. You realize now that it doesn't make any difference whether you did or didn't. That doesn't really make one bit of difference at all at this stage of the game but I want to make sure concerning somebody else that might have been involved. Because you see what it amounts to, Duane, is that eventually you are going to have to testify about everything you said here and it isn't going to make one bit of difference whether or not you leave out one fact or not, as far as you are concerned.

Do you understand what I am trying to tell you?

A. Yes.

a. As the Court well knows, to suborn perjury is to encourage another to lie under oath.

b. The suborning of perjury is effected when the person so encouraged to lie under oath does, in fact, lie under oath.

Respondent brings the Court's attention to the above-cited exchange between

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O'Leary and Duane Peak in order that the Court might examine for itself what respondent contends is, at the very least, questionable conduct on the part of the deputy chief County Attorney. Respondent contends that Duane Peak was encouraged to falsely implicate David Rice and that it did "make one bit of difference whether you leave out one fact or not," that fact being that David Rice did not have responsibility in the bomb-slaying of Patrolman Minard.

3. Coerced testimony of Duane Peak

a. Following his arrest, Duane Peak was frightened, felt alone, and wanted to call his parents, but was not permitted to do so(prelim. hearing, p. 72, lines 13-24).

b. Duane Peak was intimidated with talk by police officers of the electric chair(prelim. hearing, p. 75, lines 13-25).

c. Between the first and second time Peak testified during the preliminary hearing, he was pressured into changing his testimony(p. 78, lines 1-23) prelim. hearing).

At the time of the preliminary hearing, Duane Peak was but sixteen years of age. That he was unstable is indicated by the fact that he had been expelled from high school(prelim. hearing, p. 79, lines 5-8), had dropped out of junior high(prelim. hearing, p. 79, lines 9-14), had taken drugs (prelim. hearing, p. 83, lines 6-11). Respondent contends that Duane Peak's instability was capitalized on by an over-zealous Office of the Prosecution, which already had this youth in a corner of sorts by virtue of the fact that there were too many people prepared to give testimony as to Peak's culpability. From Peak's perspective, he had no choice but to cooperate with the machinations of the State in its prosecution of respondent.

4. Bargain for 'juvenile delinquency'

a. Thomas Carey was the legal counsel for Duane Peak.

b. As counsel for Peak, he was instrumental in obtaining a deal whereby Peak would be permitted to plead guilty to lesser charges than first-degree murder(p. 1035, line 2-p. 1036, line 13).

c. In fact, shortly after Rice had been convicted of murder in the first-degree, Duane Peak did have his day in court and pleaded guilty to 'juvenile delinquency.'

Respondent submits to the Court that Duane Peak's testimony was a direct result of the combined factors of threats by police officers and possibly others connected with the official State apparatus, encouragement to give false testimony by Arthur O'Leary, and the offer of a deal "letting him off the hook" in exchange for his testimony implicating Rice.

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It is submitted to the Court that the State's prosecution was politically motivated, that the State of Nebraska began, from the initial investigation, with either the presumption that David Rice was involved or with the hope that a case could be constructed that would show his involvement. Respondent further submits that the trial was political and was used by the State as an instrument by which respondent's Constitutionally guaranteed right to freedom of speech might be curtailed.

David Rice, at the time of his arrest, was Deputy Minister of Information for the Nebraska chapter of the National Committee to Combat Fascism, an organ of the Black Panther Party. Both as an individual and as a member of this organization, Rice was very critical of the present political and economic System. And he frequently was highly critical of and made inflammatory remarks about the Omaha Police Dept. Aside from the role of political agitation from outside the System, Rice also played a role within the System, as a community worker under the employ of Greater Omaha Community Action(a federally sponsored anti-poverty program) and as a member of the Democratic Central Committee and Democratic co-chairperson of Ward II. Because of his vocal presence in the community of Omaha, he was subjected to frequent acts of intimidation by members of the Omaha Police Dept., to harassment, and to constant surveillance. Respondent contends that his

arrest, trial, and conviction in this instant case constituted the culmination of the various attempts by local(Omaha) officials to "get him off their back." Respondent offers to the Court the following items of evidence to support his contention that his prosecution was politically motivated and constituted a violation of his Constitutionally guaranteed right of freedom of speech.

13b

1. The first indication of respondent's contention is to be found in the illegal warrant for the search of his home: "David Rice is a known member of the National Committee To Combat Fascism, which advocates the violent killing of police officers."

2. Respondent submits to the Court certain statements made by Arthur O'Leary in his opening statement made to the trial court:
(p. 128, lines 1-6; p. 136, line 23-p. 137, line 1)

3. Respondent asks the Court to examine the testimony of Sgt. Swanson relative to the political advocacy of David Rice:
(p. 84, line 1-p. 90, line 14; p. 126, lines 14-23; p. 318, lines 13-15; p. 319, line 3-p. 328, line 8; p. 357, line 11-p. 359, line 22)

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Respondent contends that the State's purpose in entering into evidence the vast amount of testimony and literature relating to the political beliefs and alleged political beliefs of David Rice and of the organization to which he belonged was to so prejudice the members of the jury that they would be unable to render a decision based upon the real evidence presented in the case. Respondent notes also that this job was made simpler for the State by the make-up of the jurors, who were in no way the peers of David Rice(The jury could be classified as white, middle-aged-to-elderly, and middle-class, while Rice was young, black, and poor).

.....

Respondent concludes this appendix by reiterating to the Court that he is not guilty of the killing of Larry Minard; that he has made every attempt, throughout his appeal process and the trial itself, to maintain his innocence; that the State of Nebraska prosecuted him, not with the intention to bring the guilty to justice, but to obtain a conviction of respondent in retaliation for his espousal of unpopular political beliefs; that the County Attorney's Office, members of the Omaha Police Dept., Judges Hamilton and Simon, et al acted in collusion to obstruct justice in this case; and that the combination of biased pre-trial publicity and the empaneling of a jury that had nothing in common with Rice combined to make a fair trial for respondent impossible.

And lastly, respondent asks that the Court to uphold the rulings of the Eighth Circuit Court of Appeals and the Federal District Court of Judge Warren K. Urbom that respondent be released or re-tried.

Respectfully,

David L. Rice
Respondent